

BRB No. 00-1166 BLA

VIRGINIA G. KURCABA)
(Widow of GEORGE F. KURCABA))
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY) DATE ISSUED:
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk,
Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia,
for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald
S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate
Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for
Administrative Litigation and Legal Advice), Washington, D.C., for the
Director, Office of Workers' Compensation Programs, United States
Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (93-BLA-0456) of Administrative Law Judge Clement J. Kichuk denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ This case has been before the Board previously.² In the most recent prior decision, Administrative Law Judge Jeffrey Tureck, considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, concluded that claimant failed to establish that the miner's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).³ Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) (2000) as the administrative law judge failed to analyze all of the relevant evidence and remanded the case to another administrative

¹Claimant is Virginia G. Kurcaba, the miner's widow. The miner filed his duplicate claim for benefits on July 8, 1987 and subsequently died on April 15, 1992. Director's Exhibits 7, 17. Claimant, after the denial of her survivor's claim, is currently pursuing the miner's claim on his behalf. Director's Exhibits 1, 17.

²The procedural history of this case has previously been set forth in detail in the Board's prior decisions in *Kurcaba v. Consolidation Coal Co.*, BRB No. 98-0399 BLA (December 8, 1998)(unpublished) and *Kurcaba v. Consolidation Coal Co.*, BRB No. 94-2606 BLA (May 31, 1995)(unpublished), which are incorporated herein by reference.

³The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

law judge for further consideration of the medical opinion evidence pursuant to the appropriate standards. *Kurcaba v. Consolidation Coal Co.*, BRB No. 98-0399 BLA (December 8, 1998)(unpublished).

On remand, Administrative Law Judge Clement J. Kichuk concluded that the medical opinion evidence of record was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000). Decision and Order on Remand at 20-25. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in failing to set forth his findings in sufficient detail and in failing to find total disability causation established. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit.⁴ The administrative law judge fully

⁴The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record..." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

set forth the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

With respect to the administrative law judge's findings pursuant to Section 718.204(b) (2000) based upon the medical opinion evidence, claimant specifically argues that the administrative law judge should have accorded determinative weight to the opinion of Dr. Haymond, based upon his status as claimant's treating physician. Claimant also maintains that the opinion of Dr. Bechtold, was entitled to great weight, as he, in contrast to employer's physicians, was unbiased, inasmuch as he examined claimant for the Department of Labor. Claimant's Brief at 4-10. Finally, claimant asserts that the administrative law judge erred in not giving great weight to Dr. Goldblatt's opinion diagnosing complicated pneumoconiosis.

With respect to claimant's argument concerning the administrative law judge's weighing of Dr. Haymond's opinion, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that when weighing the medical opinion evidence, an administrative law judge must look beyond the author's status as a treating physician and carefully assess the factors that affect the probative value of the opinion, *i.e.*, the physician's qualifications, the nature and quantity of the documentation underlying the opinion, the extent to which a physician has explained his conclusions, and the sophistication of the doctor's diagnoses.⁵ *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge, in the instant case, properly considered the relevant evidence of record, noted Dr. Haymond's status as the miner's treating physician for approximately fifteen years, and acted within his discretion in according less weight to Dr. Haymond's opinion, that the miner's coal workers' pneumoconiosis contributed to his disabling emphysema, as he found it was not well-reasoned since it is significantly unsupported by the objective test data. *See Akers, supra; Jarrell, supra; Hicks, supra.*; Decision and Order on Remand at 22-23; Director's Exhibits 8, 26; Claimant's Exhibit 1; Employer's Exhibit 3. We, therefore, affirm the administrative law judge's weighing of Dr. Haymond's opinion as the administrative law judge has provided valid reasons for finding the treating physician's opinion entitled to less weight.

⁵This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Claimant's contention that the administrative law judge erred in failing to accord determinative weight to the opinions of physicians who provided reports at the request of the Department of Labor is also without merit. Claimant's Brief at 4-6; Director's Exhibits 7, 9. The administrative law judge is not required to accord any additional weight to a physician's opinion on this basis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). We also reject claimant's contention that the opinions of employer's physicians demonstrate bias in favor of employer in this case because claimant has not established a foundation for her assertion by referring to specific evidence in the record that would support her claim of bias.⁶ *See Melnick, supra*; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984); Director's Exhibits 16, 17; Employer's Exhibits 1-6, 9.

⁶We also reject claimant's contention that 20 C.F.R. §718.204 (2000) "implies that when you have qualifying tests then you have satisfied the causation issue." Claimant's Brief at 7. Qualifying objective studies which establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) and (2) (2000) do not establish a presumption that the disability is due to pneumoconiosis. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, contrary to claimant's assertion, the administrative law judge was not required to discuss cor pulmonale as total disability was already established and the presence of this condition does not establish that the disability is due to pneumoconiosis. 20 C.F.R. §§718.204(c)(3), 718.204(b) (2000); Claimant's Brief at 9-10; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Additionally, claimant's assertion that the administrative law judge erred in failing to credit Dr. Goldblatt's opinion of complicated pneumoconiosis lacks merit. Claimant's Brief at 9. The administrative law judge rationally concluded that Dr. Goldblatt's opinion was insufficient to entitle claimant to the benefit of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304 (2000). The administrative law judge, within his discretion as fact finder, permissibly concluded that the weight of the contrary probative evidence, including the reasoned opinions of Drs. Renn, Kleinerman and Fino, outweighed the opinion of Dr. Goldblatt. *Trent, supra; Perry, supra; Decision and Order on Remand at 23*. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Renn, that the miner's impairment results from smoking and not coal dust exposure, as the opinion was well reasoned, consistent with and supported by the vast medical data in the record, the physician considered all of the medical evidence of record, and possess superior credentials in the field of pulmonary medicine and his opinion was supported by the reasoned opinions of Drs. Kleinerman, Fino, Morgan, Lapp and Kress, who also possess superior qualifications.⁷ *See Akers, supra; Hicks, supra; Decision and Order on*

⁷The administrative law judge properly summarized the opinions of Drs. Bechtold and Stead. *Decision and Order on Remand at 7-9*. Although the administrative law judge failed to specifically address Dr. Bechtold's opinion or to indicate why Dr. Kleinerman's opinion refuted Dr. Stead's statements in the weighing of the evidence, as the administrative law judge has rationally accorded greater weight to the opinion of Dr. Renn, a remand is not required. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-376 (1983); *Decision and Order on Remand at 7-9, 23-24*. Additionally, contrary to claimant's contention, the

Remand at 22-24; Director's Exhibits 6, 7, 12, 16-18; Claimant's Exhibits 1, 6; Employer's Exhibits 1-6, 9.

administrative law judge is not obligated to give the prosector's opinion greater weight because he has had the opportunity to review the entire lung. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR (4th Cir. 2000); *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Cantrell v. United States Steel Corp.*, 6 BLR 1-1003 (1984). Moreover, we note that Dr. Bechtold's opinion, that the miner suffers from "severe COPD and pneumoconiosis most likely arising from combination tobacco use and dust exposure," is insufficient to meet claimant's burden of proof in this instance. 20 C.F.R. §718.204(c) (2001); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Director's Exhibit 18.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trent, supra; Perry, supra; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish that the miner was totally disabled due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trent, supra; Perry, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as the administrative law judge rationally found that the medical opinions of record failed to establish that the miner's total disability is due to pneumoconiosis pursuant to Section 718.204(b) (2000), we affirm the denial of benefits in the miner's claim as it is supported by substantial evidence and in accordance with law.⁸

⁸Although the administrative law judge briefly addressed the survivor's claim on remand, that claim was not properly before him as the Board in its prior Decision and Order, affirmed the denial of benefits in the survivor's claim and remanded only the miner's claim for further consideration. *Kurcaba, supra*. Thus we decline to address claimant's contentions or review the administrative law judge's findings with respect to the survivor's claim.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge